PRIVACY

Companies are delving further into employees' personal lives—and workers are fighting harder for the right to be let alone

On Oct. 29, 1987, Eastern Air Lines Inc. apparently received an anonymous tip that some of its baggage handlers at Miami International Airport used drugs. Security guards rounded up 10 workers in the plane-loading area. Then, in full view of other employees and passengers, the workers were marched down a guard-lined path to waiting vans—"like terrorists," as a lawsuit filed by the workers describes it. After questioning the men, supervisors put them aboard a bus—once again in front of onlookers—and took them to a hospital. Then came an ultimatum: Either take a urine test or be fired on the spot.

All 10 employees, members of the International Association of Machinists, tested negative. Later they filed suit in federal court, seeking at least $30,000 each on charges of invasion of privacy, defamation, and intentional infliction of emotional distress. Eastern refuses to discuss the incident. In its motion to dismiss the case, Eastern contends that the complaint should be resolved in a union grievance procedure.

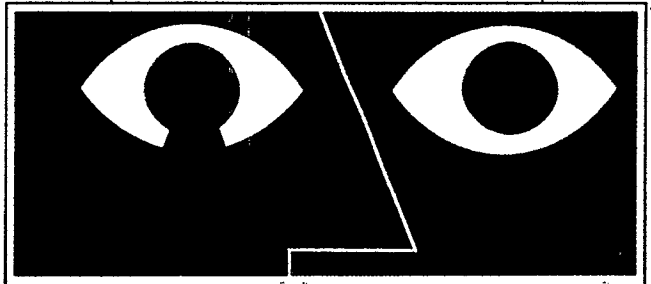
Wherever this case winds up, it's a gripping example of the quintessential—and growing—American concern about privacy. The right to privacy, U. S. Supreme Court Justice Louis D. Brandeis wrote in 1928, is "the right to be let alone—the most prehensive of rights and the right most valued by civilized men." Brandeis was referring to the Fourth Amendment's guarantee against "illegal searches and seizures" by government. Today, Americans are asserting the "right to be let alone" by a different adversary: their employers. A nationwide controversy is erupting as companies probe deeper into workers' habits and health.

Unlike past labor uprisings, workers aren't mounting strikes over the privacy issue. Today's combat involves lawsuits, huge jury awards, and demands for leave-me-alone legislation. Individual employees and unions are filling court dockets with challenges to random drug-testing. AIDS patients are suing employers for breach of confidentiality when co-workers learn about their condition. Employee advocates are demanding limits on electronic and telephone eavesdropping. And concern is growing over the potential for employers to delve into electronic data bases that collect the tiniest pieces of an employee's lifestyle under one neat label: the Social Security number.

SNOOPING? The protests are being heard. Both the House and the Senate just passed bills restricting lie detector tests by private companies. Declares Paul Saffo, an expert on information technologies at the Institute for the Future: "After health care, privacy in the workplace may be the most important social issue in the 1990s."

It's not that most companies are idly snooping into their employees' lives. Behind the erosion of privacy lie pressing corporate problems. Drug use costs American industry nearly $50 billion a year in absenteeism and turnover. When employer groups opposed the lie detector bills, they cited employee theft, which is estimated at up to $10 billion annually. Moreover, in the litigious 1980s, failing to ensure a safe and drug-free workplace can subject an employer to millions in liability claims when people are injured by an errant employee or faulty products.

The difficulty is maintaining a proper balance between the common good and personal freedom. It may be laudable for companies to hold down soaring medical costs



ILUSTRATION BY JAVIER ROMERO

THE BASIC ISSUES

DRUG-TESTING Seven states have passed laws restricting drug tests. Random testing in private industry is under legal attack, and the Supreme Court has agreed to decide whether testing government employees violates the Fourth Amendment

AIDS Employees with AIDS are covered by laws protecting the handicapped. But few companies have educated their work forces to prevent discrimination by co-workers

LIE DETECTOR TESTS The first federal law restricting the use of polygraphs is now being drafted from bills passed recently by the House and Senate. Similar laws already exist in 31 states

COMPUTER SURVEILLANCE Federal and state restraints on employer monitoring of computer work and telephone conversations are under discussion. Meanwhile, companies have increasing access to electronic data bases that contain vast amounts of personal information on employees

GENETIC SCREENING Lab tests can determine whether employees have genetic traits that make them susceptible to certain diseases. Some authorities say legislation is needed to prevent employers from using such tests to screen job applicants

DATA: BW

DRUG TESTING

DID THIS COMPANY GO TOO FAR?

It was a welcome back that Wanda Creer won't forget. Returning from five weeks of sick leave in late 1986, the 45-year-old lab technician at Pacific Refining Co. in Hercules, Calif., was ushered into the ladies' room. There an employee of a drug-testing lab held the stall door open and watched Creer lower her pants and urinate into a cup.

"When I left the room, I was angry, I was hurt, I was crying," recalls the soft-spoken Creer. Suffering from a peptic ulcer, she was taking medication that she feared would show up in the urinalysis. "I thought I'd lose my job."

Creer and several others sued Pacific Refining on behalf of more than 90 employees who were checked, charging that random testing violated the California constitution's ban against unreasonable invasion of privacy. A state court issued an injunction halting the tests. The class action is expected to reach trial by yearend.

'PREPOSTEROUS.' Pacific Refining maintains that testing is necessary as a safety precaution. "We've got an entire town right across the fence from the refinery," says James P. Hargarten, Pacific Refining's attorney. "One mistake could be catastrophic."

Creer says she has "never used any kind of illegal drug." Her one bad habit, she confides with a slight smile, is an occasional cigarette. "Wanda is a good example of how stupid this whole thing is," says John M. True, a San Francisco civil liberties attorney representing the plaintiffs. "The idea that the employer feels it's necessary to confirm her innocence when she hasn't even been charged is preposterous."

'When I left the room
I was angry, I was hurt,
I was crying.
I thought I'd lose my job.'

—Wanda Creer

by giving employees checkups and offering exercise programs. But what keeps helpful advice on high blood pressure from becoming an ominous decision on an employee's promotion potential? There are few standards to help answer such questions. "It is an era of legal uncertainty," says Robert B. Fitzpatrick, a Washington lawyer who represents both companies and employees. "In a lot of states the law is in flux, and it is unclear what the rules are any longer."

'FEAR OF ABUSE.' What is clear is that employers face a complex challenge. For years, American workers seemed to lack the body-and-soul dedication of their Japanese counterparts. Now, U. S. companies are beginning to gain the commitment of workers, who often build their private lives around the job—and the pension and health plans linked to it. But as this happens, employees also bring their off-the-job values—and demands—to work. Increasingly, says Alan F. Westin, a Columbia University professor who has studied individual rights in the corporation since the 1950s, "Americans are coming to believe that the rights we attach to citizenship in the society—free expression, privacy, equality, and due process—ought to have their echo in the workplace."

Privacy today matters to employees at all levels, from shop-floor workers to presidents. "I don't think politicians and corporate executives realize how strongly Americans feel about it," says Cliff Palefsky, a San Francisco lawyer who handles employee lawsuits. "It's not a liberal or a conservative issue, and the fear of abuse doesn't emanate from personnel policies. It's coming out of the larger, impersonal notion that workers are fungible, expendable items."

Huge jury awards in recent privacy cases reflect these concerns:

- A supervisor for Georgia-Pacific Corp. in Oregon fired a man based on an anonymous letter stating that the worker had been drunk in public. Then the supervisor repeated the allegation at a meeting of 100 employees. Concluding that such wide dissemination damaged the worker's reputation, a state appeals court upheld a $350,000 defamation award.
- A drugstore employee refused to take a lie detector test during an investigation of stock shortages at Rite-Aid of Maryland Inc. Though the company violated a state law in ordering the test, it forced the woman to resign. A state appeals court affirmed a $1.3 million award for behavior that "amounted to a complete denial of [her] dignity as a person."

These aren't isolated stories. A survey by Ira Michael Shepard and Robert L. Duston, members of a management law firm in Washington, turned up 97 jury verdicts against employers in privacy cases from 1985 to mid-1987. Damage awards averaged $316,000. Before 1980 employee suits for invasion of privacy rarely reached a jury.

They do now—largely because a decade of litigation and legislation involving employee rights has laid the groundwork. This movement has led to laws that give employees the right to know about hazardous workplace chemicals, that protect whistle-blowers, and that give workers access to medical and personnel records. Complaints of discrimination by age, race, and sex are also increasing fast. Meanwhile, nonunion workers, aided by state courts, are successfully challenging the once-undisputed employment-at-will doctrine. This gave private companies the right to dismiss employees without cause.

The erosion of the at-will concept clears the way for workers to sue employers over privacy issues. Otherwise, such cases are often difficult to file. State laws that regulate polygraph testing, for example, provide for prosecution of corporate violators but give no redress to wronged employees. But using precedents from employment-at-will cases, workers can often prove unfair dismissal—and win big awards.

TURNING POINT. All these trends are creating chaos in the rules that govern the workplace. And the changes this will bring in the employer-employee relationship could be as far-reaching as those that followed the breakthrough of industrial unionism in the 1930s. The difference is that today the courts and Congress may do much more quickly what unions would take decades to achieve. "The idea that the employment relationship cannot be regulated will never be with us again," says William B. Gould, a labor law professor at Stanford University (page 68). "In some form or another, we're going to have regulation."

The tension over privacy, in fact, marks a turning point in the cycle of

JAMIE TANAKA

management-labor relations. Starting in the early 19th century and for decades after, employers exercised wide dominion over employees' lives. Companies built and ran company towns. In 1914, Henry Ford's workers were promised a $5-a-day wage only after Ford's "sociologists" visited their homes and deemed them morally qualified. The growth of unions, the improved education of the work force, and the civil-rights and civil-liberties movements of the 1960s seemed to kill off these Big Brother policies. In the 1980s, however, the cycle is reversing—as the controversy over these major issues indicates:

■ **AIDS discrimination.** Employees with AIDS are already protected by federal and state laws that guarantee job rights for the handicapped. Nonetheless, some people with AIDS have been fired and in several instances not reinstated before they died.

Most companies have neither a policy nor an educational program on AIDS. Emerson Electric Co. in St. Louis has had "a couple" of employees with AIDS, says John C. Rohrbaugh, vice-president for corporate communications. Those who have the disease became known "because other employees didn't want to share phones or work in the same offices," Rohrbaugh adds. Typically, "We didn't take any type of action, and eventually the employee became more and more debilitated until he was too sick to work, and frankly, he died."

The modern weapons of the privacy war: Lawsuits, huge jury awards, and demands for new legislation

For many companies, such ad hoc handling of the situation may be a costly mistake, says David Herold, director of the Center for Work Performance Problems at the Georgia Institute of Technology. In a survey conducted for the center last year, 35% of 2,000 workers said they didn't believe that AIDS can be transmitted only by sexual contact or blood contamination. The same percentage of workers said they'd be "concerned" about using the same bathroom as people with AIDS.

Herold believes the costs of caring for AIDS sufferers could pale by comparison with the productivity losses if healthy employees refuse to work alongside them. And he disparages the policy of many companies to treat AIDS "like any other illness." Adds Herold: "If that's what they mean by policy, that's nonsense, because other employees will not treat it like any other illness."

Some 30 of the nation's largest employers agree. IBM, AT&T, and Johnson & Johnson, among others, have endorsed a 10-point bill of rights on AIDS issues. It calls for education to dispel fears, urges that medical records be kept confidential, and pledges not to test for the AIDS virus in hiring.

■ **Polygraph testing.** Do lie detectors tell the truth? According to recent surveys, a lot of companies think they do. Studies show that about 30% of the largest companies and more than 50% of retail businesses use lie detectors to test honesty in preemployment screening and to help investigate workplace thefts. Proponents contend that patterns of blood pressure, perspiration, and breathing recorded as a subject responds to questions reveal a liar's "internal blushes."

But many scientific and medical groups, including the American Medical Assn., disagree. A strong response to a question could indicate guilt, fright, anger, "or indeed whether you artificially induced the reaction by, say, biting your tongue," says one critic. As a result, 21 states prohibit the use of tests as a condition of employment in private industry, and 10 more place restrictions on the types of questions that can be asked.

Now, after years of trying, it appears

LIE DETECTORS

A PERFECT RECIPE FOR A LAWSUIT

By 1982, John J. O'Brien had worked nearly 10 years for Papa Gino's of America, a New England restaurant chain. As an area supervisor, he was in charge of 28 restaurants and about 500 employees. "I was in line for vice-president and felt a strong loyalty to the company," O'Brien recalls.

Suddenly his life "was cut right in half." Despite repeated requests, he refused to promote a company director's son who was also the godson of the president, contending the man was incompetent. A few weeks later, O'Brien's boss told him that someone—Papa Gino's never identified the person—had seen him take drugs at a party. The company gave O'Brien two choices: take a polygraph test or be fired.

'HIGHLY OFFENSIVE.' "I was angry that they were putting a machine against my word and my history with the company," O'Brien says. But he took the test. Papa Gino's said it proved he lied and fired him. He sued. For the next three years, O'Brien, a 32-year-old father, couldn't find work. "It was like hell," he says. "I went from $50,000 a year and a lot of good self-image to no employment at all."

'It was like hell. I went from $50,000 and a lot of good self-image to no employment at all'
—John J. O'Brien

In 1985 a federal jury found the polygraph investigation "highly offensive" and awarded damages that eventually totaled $595,000. A federal appeals court upheld the award, as well as findings of defamation and invasion of privacy. Now a renovator of houses in New Hampshire, O'Brien feels the false charge of drug abuse will always be with him. "People in the company avoided me like the plague when they spread that around, and I think I'll always carry the stigma."

JON GOELL

that polygraph opponents will push through a federal law. A Senate bill passed on Mar. 3 would bar most private employers from using polygraph exams in the hiring process, though it permits the testing of current employees during investigations of a theft or other incident causing "economic loss or injury." It also exempts private security firms and nuclear power plants.

A stronger House bill passed last November forbids private employers to use the polygraph for any purpose, but exempts security firms and drug companies. A House-Senate committee will reconcile the two bills. Although President Reagan earlier threatened to veto a polygraph law, he may approve one if the Senate version prevails.

■ **Defamation and negligent hiring.** Employees often sue when a former employer gives damaging information to a prospective employer. Because companies sometimes need to compare notes on hiring, their communications are considered "privileged." But they can lose this protection if they give information to too many people or hand out false information maliciously.

The fear of defamation suits has caused many companies, probably the majority, to refuse to say anything about a former employee except "name, rank, and serial number." But this practice is having an adverse effect on screening job applicants, which sometimes causes companies to hire people with unsavory backgrounds. Their unlawful conduct can lead to a negligent hiring suit and enormous damages. For example, in 1985 a car rental agency had to pay $750,000 in damages to atone for an employee who repeatedly hit a customer with "judo chops." In that case, a court found, the employer had ignored evidence of the worker's irascibility.

■ **Confidentiality of employee records.** Considerable private information about workers exists in computer data bases kept by practically every business and government agency—and it's available to a surprisingly wide range of snoops. A crazy quilt of state and federal laws, as well as court rulings, regulates employer access to such information. Some areas, such as medical data, are highly protected. But others aren't.

Credit bureaus, for instance, sell information on employees' bank accounts, outstanding bills, and tax liens or bankruptcies, although all negative records must be purged after seven years. Only recently, TRW Inc., the largest supplier of consumer credit information, began selling such data to employers. "It didn't sound like the kind of thing we wanted to be involved in," says Edward F. Freeman, vice-president and general manager of TRW's information services division. But "it's what our customers wanted, and all our competitors were doing it."

Certain employers, such as banks and nuclear power plants, can get criminal histories of prospective employees from the Federal Bureau of Investigation's Identification Div. data base on more than 20 million people. In some states, other employers can get FBI information, too. Now the Bureau is considering lifting a major restriction on its criminal history data base: It may delete a rule requiring that information on people who are arrested but not convicted can't be disseminated after one year. Critics say this would add to the volume of potentially false information that employers can collect.

MONITORING SOCIAL LIFE

BREAK UP WITH THAT GUY—OR ELSE

MENDEZ/PICTURE GROUP

'If this is one of the best companies and this is what they did, then how does one of the worst companies treat their people?'
—Virginia Rulon-Miller

Virginia Rulon-Miller never thought she'd leave her job at International Business Machines Corp. And certainly not under such unpleasant circumstances. But after 12 years there, the last as an award-winning marketing manager in a division office in San Francisco, she made a mistake: She fell in love.

In 1979, one week after receiving a 13.3% raise, she was called on the carpet. Was she dating Matt Blum, a former IBM account manager who had gone to a competitor? There was no denying it: The two had dated while Blum was at IBM, and he still played on an IBM softball team. Rulon-Miller was ordered to forget about Blum or be demoted. "I was so steeped in IBM culture that I was going to break up with Matt," she says. She didn't get the chance. As she testified in court, she was dismissed the next day.

TRIAL TOLL. In preparing her wrongful discharge suit, Rulon-Miller's lawyer discovered something her old boss didn't know: No less an authority than former IBM Chairman Thomas J. Watson Jr. had declared that "we have concern with an employee's off-the-job behavior only when it reduces his ability to perform regular job assignments." A jury in state court agreed. In 1984, Rulon-Miller won $300,000 in back pay and punitive damages.

Like every trial, this one took its toll. "I couldn't function for four or five months," says Rulon-Miller. But she adjusted. Now a regional director for a computer sales company, she has broken off with Blum. But she still feels the same about IBM. "There was a real sense of security and a feeling of family. If I had my way, I'd still be there."

Many large employers have guidelines requiring managers to prove a specific business purpose before gaining access to sensitive information. But many don't. And the American Civil Liberties Union fears that voluntary guidelines won't work if the political climate changes. "What happens if society's pendulum shifts to be less concerned about personal liberty?" asks Jerry Berman, director of the ACLU's project on information technology and civil liberties.

■ **Monitoring.** Over the past decade, practically every major employer has gained the ability to monitor workers' performance through the computers and phones they use. This practice is already prevalent in service-oriented businesses such as insurance and telecommunications. And unless it's done carefully, workers resent it. "I don't think people mind having their work checked," says Morton Bahr, president of the Communications Workers of America (CWA). "It's the secretiveness of it. It's like being wired to a machine." The CWA is pushing a bill in Congress that would prohibit secret monitoring in all industries and require regular beeps when a supervisor is listening.

Worker advocates in Massachusetts are carrying the fight further in a bill that has raised strong objections by industry groups. In addition to requiring beeps, the proposal would limit the amount of monitoring and require employers to explain in writing the purpose and results of monitoring.

■ **Genetic screening.** The most pernicious use of technology to invade privacy may be yet to come. Scientists already can identify genetic traits that indicate a predisposition to such diseases as heart disease and cancer. In 1980, Du Pont Co. came under fire for testing black employees and applicants for sickle cell anemia. The tests were given as a "service to employees," and the results were not used in hiring or career decisions, says Dr. Bruce W. Karrh, a Du Pont vice-president. But because of the controversy, the company now does testing only at workers' request.

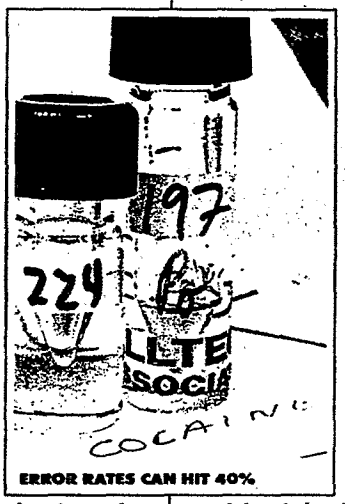
Genetic testing might be used legitimately to ensure that employees susceptible to certain occupational diseases aren't put in the wrong work environments. And as far as anyone knows, no companies now use the tests to deny employment. But Mark A. Rothstein, director of the University of Houston's Health Law Institute, believes employers eventually will try that, if only to help hold down health care costs. "Unless we have some clear indication that employers aren't going to be engaged in screening, legislation may be necessary," he says.

A preview of this issue may come as companies mount more aggressive

TESTING FOR DRUG USE: HANDLE WITH CARE

The critics of drug testing are beginning to get their message across. Although screening of new applicants is up, companies may be cutting back on the most controversial practice—random tests of current workers without reasonable cause. "Even friends of testing are ready to write off random checks," says Robert L. DuPont, former director of the National Institute on Drug Abuse.

One verdict already has sent a chilling message to employers. Last October a San Francisco jury awarded damages of $485,000 to Barbara Luck, a 37-year-old computer programmer for Southern Pacific Transportation Co., who was fired for refusing to take a surprise urinalysis in 1985. Luck's claim relied on a broad right-of-privacy provision in California's constitution. Southern Pacific has appealed. Meanwhile, six of the seven states with laws on drug testing allow random tests only for workers in hazardous and safety-related jobs. Utah is the sole exception.



ERROR RATES CAN HIT 40%

SLIPSHOD TECHNIQUES. Companies are even getting more careful about announced drug tests. A 1987 American Management Assn. survey of 1,000 companies showed that 34% had a drug-testing policy, up from 21% in 1986. But, newly aware of slipshod testing techniques, many companies now do months of study before starting a program. Corporate attorneys tell clients to confirm results with a second test and maintain confidentiality. "We spend a lot of time rewriting policies after companies have fallen on their swords," says Ted Schramm, president of Behavior Research Inc., a San Diego consulting firm.

Even the testing of job applicants is coming under challenge. In San Francisco, two women are suing Matthew Bender & Co., a publisher of legal books, and its parent, Times Mirror Co. The women, who refused to be tested, charge that the policy is an invasion of privacy. Bender says it has no plans to stop testing applicants, and the company is fighting the suit.

It may also be getting harder to test employees under government supervision, even with advance notice. In February a federal appeals court in San Francisco struck down as unconstitutional a federal rule that made railroad workers subject to drug and alcohol testing after accidents. The Supreme Court should shed more light on the subject: It's expected to rule on whether the testing of U.S. Customs Service workers when they're promoted violates the Fourth Amendment.

Some of the sharpest criticisms of drug tests involve technology. Although testing has grown into a $1 billion industry, there are no standards for handling laboratory samples. "It's very easy to set up a poor lab, but not so easy to set up a good one," says Richard L. Hawks, chief of research technology at the National Institute on Drug Abuse.

BAD LABS. Indeed, the error rate for urinalyses can be as high as 40%, says consultant Schramm. While labs used by federal agencies will soon be required to meet minimum standards, private employers can hire anyone. "A lot of companies are being sold a bill of goods," contends Cliff Palefsky, a San Francisco employment attorney.

Opponents of drug testing also claim that a positive test doesn't determine impairment—only traces of a drug possibly ingested weeks before. "For bosses concerned about a drug-free workplace, visual observation is more accurate than a urine test," says political activist Abbie Hoffman. Laws in a few states allow testing only if an employer has reason to suspect impaired job performance. In addition, Rhode Island's law requires companies that test to have a drug counseling program.

In the end it may come down to economics. Testing for drugs can cost from $15 to $45 per exam. With the threat of large jury awards figured into the equation, companies may have to look more closely at the trade-off between their own peace of mind and that of their workers.

By Katie Hafner in San Francisco, with Susan Garland in Washington and bureau reports

ANDREW POPPER

"wellness" programs that try to push employees toward healthier lifestyles. So far these programs seem aimed at helping employees live longer—and improve their productivity. But the logical next step is mandating off-the-job behavior. "I think employers are going to get deeper and deeper into the wellness business," says Columbia's Westin. "This is going to throw up a series of profound ethical and legal dilemmas about how they should do it and what we don't want them to do."

Most workplace privacy issues pose these kinds of difficult questions. They pit the needs of the company against the worker's feelings of dignity and worth. To sacrifice much of the latter would make work life untenable. So the U.S. must decide which rights of a citizen in society should extend to an employee in the corporation—and in what form. If employers don't voluntarily start this process, the courts or legislatures will do it for them.

By John Hoerr in New York, with Katherine M. Hafner in San Francisco, Gail DeGeorge in Miami, Anne R. Field and Laura Zinn in New York, and bureau reports

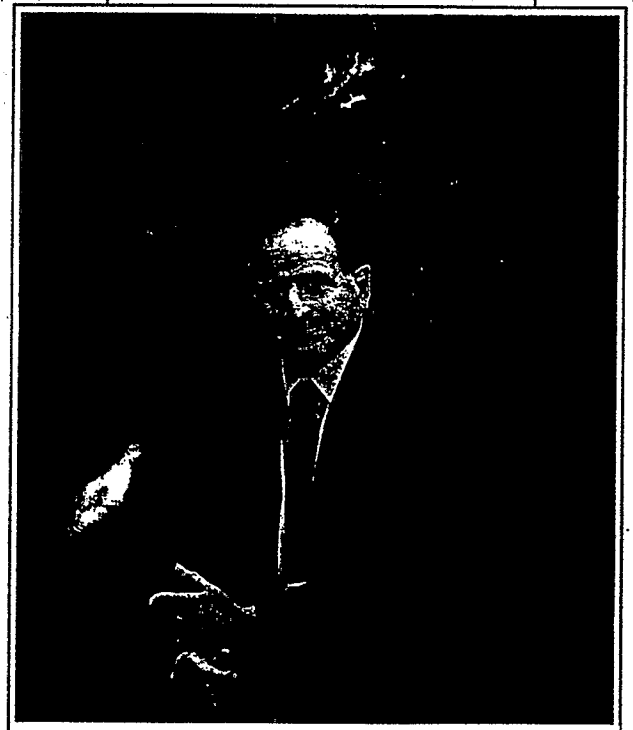
IT'S GETTING HARDER TO PASS OUT PINK SLIPS

Trying to bring order out of the turmoil over privacy and other employee rights on the job is like trying to smother a hundred fires with one blanket. Each issue has a life of its own. But one common factor must be involved in any effort to standardize a good employment relationship: Determining who will decide what constitutes fair treatment on the job.

For much of America's industrial history, employers made that judgment unilaterally. Unions won a voice in the decision-making process for unionized workers—some 33% of private-industry employees in the mid-1950s but now down to 14%. Some labor-law specialists such as Paul C. Weiler at Harvard University argue that collective bargaining is the ideal way to settle job disputes. But he and other union supporters see little chance that organized labor will raise the 14% figure in the near future. That leaves the vast majority of the 85-million-member work force without a formal—and binding—complaint procedure.

SWEPT ASIDE. Under the old common-law doctrine of employment-at-will, workers had no recourse if they were fired without just cause. But since the late 1970s, state courts have entered the battle on the side of employees, letting them sue for wrongful discharge under exceptions to the doctrine. Such suits are now permitted in 46 states. And this was occurring just as legions of nonunion employees in technical, professional, and managerial jobs were being swept aside in the work-force reductions of the 1980s.

These changes, along with a dramatic decline in corporate loyalty, led thousands of such workers to seek court-ordered redress. Alan F. Westin, a political scientist at Columbia University, estimates that 25,000 suits alleging termination without cause are pending in state courts, compared with about 200 in the late 1970s. But litigation to resolve employment disputes represents "the worst of all possible worlds," says William G. Gould IV, a labor law professor at Stanford University. Low- and middle-income employees seldom sue because of the high cost of going to trial. And lawyers operating on a contingency basis prefer executive clients seeking big awards.



WESTIN: COMPANIES SHOULD DEVELOP COMPLAINT SYSTEMS

Meanwhile, companies are subject to volatile and unpredictable juries that know little about the employer's business and sometimes ignore court instructions. Given such circumstances, some employers reluctantly favor a third option: laws to prevent firings without good cause. All other major industrial nations have them. Montana adopted the U.S.'s first late last year.

Montana juries had given huge damages to dismissed employees. To stop that, employers endorsed a law that caps their liability at four years of back wages. It also prohibits firings without "just cause" for workers who have completed a probationary period. The law, which is too new to have much of a track record, allows arbitration but lets suits proceed if arbitration is rejected.

Gould, Weiler, and other academic analysts of unjust discharge believe legislation is needed to protect nonunion workers. But Westin wants employers to voluntarily adopt complaint systems giving nonunion employees due process and a fair hearing.

Employers such as Federal Express, Citicorp, and International Business Machines already have such systems, though none calls for binding arbitration. But Westin believes employees perceive them as fair. "What makes these procedures work is that they are organized by companies dedicated to long-term employees, and there is a commitment to flexibility and change on the part of the workers," he says.

About 10% of private employers have well-developed complaint systems, Westin estimates, and an additional 60% or so will eventually set up such systems to escape regulation. "Sometime in the mid-1990s," he says, "the movement toward fair-complaint systems will hit the barrier of the final 30% of employers who always wait for the law to tell them what to do. Then a law will be required."

By John Hoerr in New York

JODI BUREN